STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 21, 2015
v	No. 321847 Kent Circuit Court
GARY MAURICE FARHAT, Defendant-Appellant.	LC No. 13-008690-FH

Before: MARKEY, P.J., and MURPHY and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant Gary Maurice Farhat was convicted of failure to stop at an accident resulting in serious impairment of body function, MCL 257.617. He was sentenced to 120 days in jail and four years' probation. Defendant appeals by right. We affirm.

Defendant argues on appeal that other acts evidence was improperly admitted under MRE 404(b). "The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion." *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). A trial court's decision is an abuse of discretion "when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 670. "When the decision involves a preliminary question of law, however, such as whether a rule of evidence precludes admission," we review the question de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). Finally, an error in admission of this evidence does not warrant reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant bears the burden of satisfying this standard. *Id.*

Other acts evidence "is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). But this evidence may be admissible

> for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court provided four factors to help determine the admissibility of evidence under MRE 404(b)(1). First, the other acts evidence must be offered for a proper purpose. *Id*. at 74. Second, "the evidence must be relevant . . . to an issue or fact of consequence at trial." *Id*. Third, the trial court must determine under MRE 403 whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *Id*. at 74-75. Fourth, the trial court may provide a limiting instruction upon request. *Id*. at 75.

In this case, the other acts evidence was offered for a purpose other than to show propensity. *VanderVliet*, 444 Mich at 74. In this case, the other acts evidence was admitted to establish a scheme, plan, or system in doing an act, a proper purpose among those listed in MRE 404(b)(1). See *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998). Therefore, the first requirement of admissibility, proper purpose, was met. *VanderVliet*, 444 Mich at 74.

The other acts evidence also had to be relevant. MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, 444 Mich at 75. In the context of a common plan or system, "evidence of similar misconduct is logically relevant to show that the charged act occurred" when there is a sufficient similarity between the uncharged act and the charged offense. *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). To establish a common system, the charged and uncharged acts must contain "sufficient common features to infer the existence of a common system used by defendant in committing the acts." *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). "General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id*. at 64. But, there does not need to be "distinctive and unusual features" to establish a common scheme or plan. *Hine*, 467 Mich at 252-253. Rather, "[t]he evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Id*. at 253.

In this case, the prosecutor offered the theory that the uncharged and charged acts shared sufficient common features because in both instances defendant did something wrong [lawn turfing vs. driving while being "a little wasted" that night]; he accidently hit something with his vehicle [a tree vs. a pedestrian], and then he fled the scene and lied about it to avoid responsibility. In this sense, the acts surrounding the 2011 lawn turfing incident and the instant offense share common features. While there is some dissimilarity between the acts, we find that there were sufficient common features between the two acts to infer that defendant employed a common scheme or system in committing the instant offense. *Hine*, 467 Mich at 252-253 (explaining that "distinctive and unusual features" between the charged and uncharged acts are not required). See also *Sabin (After Remand)*, 463 Mich at 67 (holding that there were sufficient common features between the charged and uncharged acts despite acknowledging that the acts "were dissimilar in many respects").

Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Danger of unfair prejudice exists when "marginally probative evidence will be given undue or preemptive weight by the jury."

People v Feezel, 486 Mich 184, 198; 783 NW2d 67 (2010). In this case, there is no indication that this evidence was given undue or preemptive weight. Moreover, the trial court gave a limiting instruction after the testimony and during its final jury instructions that the other acts evidence was only allowed to be used to establish a plan, system, or scheme. These limiting instructions lessened the potential for prejudice because "jurors are presumed to follow their instructions." *People v Mann*, 288 Mich App 114, 118-119; 792 NW2d 53 (2010). Also, the prosecutor limited his argument regarding the evidence to its proper purpose. Therefore, the trial court did not err by determining that the probative value was not substantially outweighed by the danger of unfair prejudice. *Feezel*, 486 Mich at 198.

Because this prior acts evidence was offered for a proper purpose, was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice under the balancing test of MRE 403, the trial court's decision was not an abuse of discretion. Specifically, admitting the evidence was within the range of principled outcomes. *Waclawski*, 286 Mich App at 670, 674. The prosecution offered numerous other purposes for this evidence; however, based on the above discussion, we need not consider these additional reasons. See *Starr*, 457 Mich at 501 (under MRE 404(b), only one proper, noncharacter reason is necessary for other acts evidence to be admissible).

Finally, we conclude that even if there were an error in the admission of the challenged other acts evidence, defendant cannot demonstrate that this error was outcome determinative. Defendant was in the same area where the victim was hit; he was there at approximately the same time; he drove either a tan or silver Ford Explorer that night and witness testimony and security video showed that the victim was hit by a light colored Ford Explorer. Most importantly, two witnesses testified that defendant admitted to hitting the victim, and one testified that defendant admitted to being "a little wasted" that night. Given the substantial evidence of defendant's guilt, we conclude that even if there were error in the admission of the prior act evidence, any alleged error was not outcome determinative, so it would not warrant reversal of defendant's conviction. *Lukity*, 460 Mich at 495-496.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Cynthia Diane Stephens